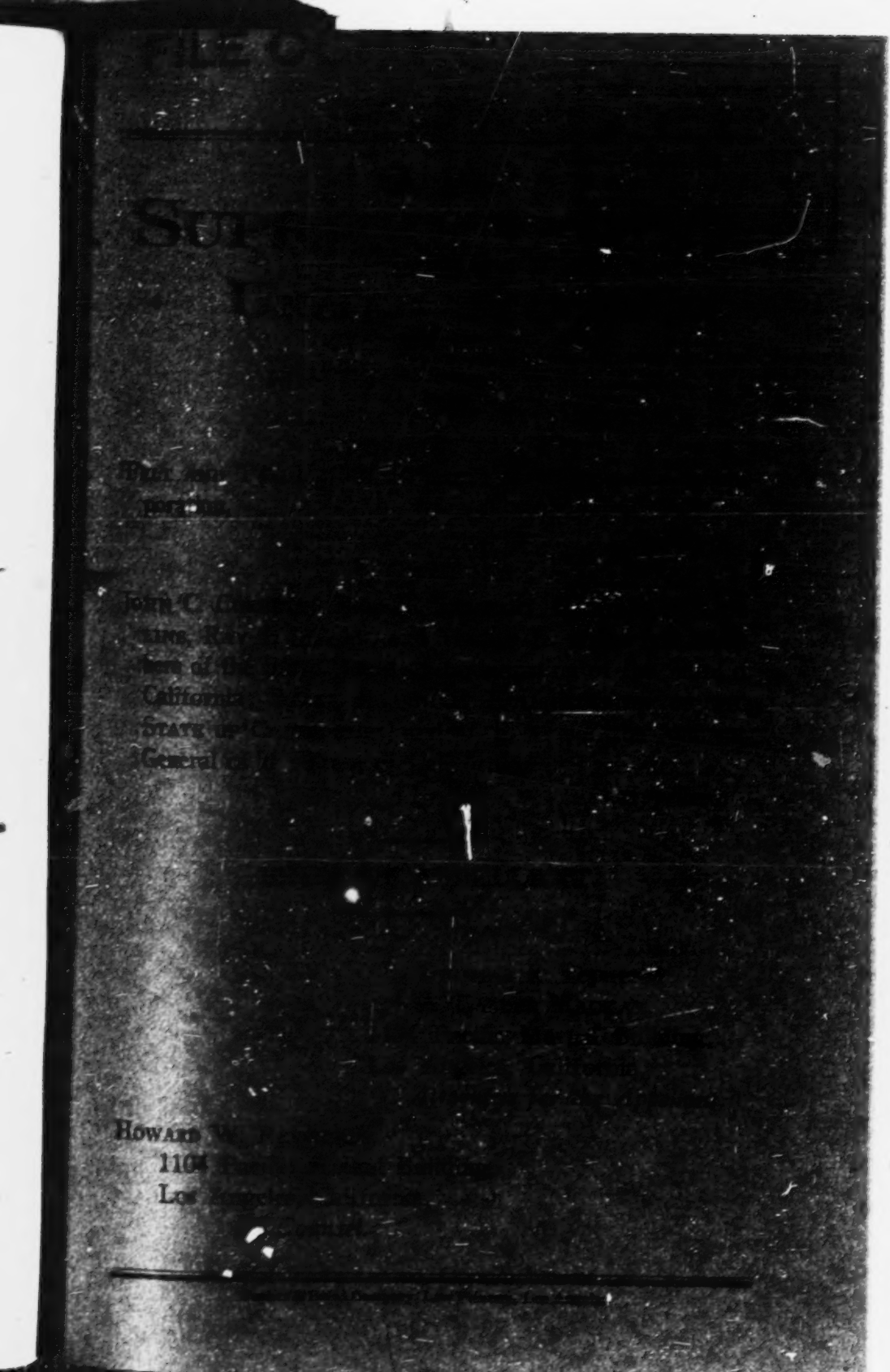

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STATUTES.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1938.

No. 302.

FELT AND TARRANT MANUFACTURING COMPANY, a corporation,

Appellant,

vs.

JOHN C. CORBETT, FRED E. STEWART, RICHARD E. COLLINS, RAY L. EDGAR, and HARRY B. RILEY, as Members of the State Board of Equalization of the State of California; STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, and U. S. WEBB, the Attorney General of the State of California,

Appellees.

BRIEF OF APPELLANT.

I.

OFFICIAL REPORT OF OPINION BELOW.

The opinion of the District Court of the United States for the Southern District of California, Central Division, from the decree of which court this appeal is taken, is reported in 23 F. Supp. 186.

II.

JURISDICTION.

Probable jurisdiction was noted by this Court on October 10, 1938.

III.

STATEMENT OF THE CASE.

(a) Decree Below.

Appellant filed a bill in the District Court seeking a decree that the California Use Tax Act of 1935 (Cal. Stats. 1935, c. 361, as amended by Cal. Stats. 1937, c. 401, 671 and 683), violates state and federal constitutional provisions, and an injunction prohibiting its enforcement against appellant. A temporary restraining order issued, but a court of three judges, after a hearing on the application for an interlocutory injunction and the motion of the appellees to dismiss, dismissed the suit. The case is before the Supreme Court on direct appeal from the decree of dismissal.

(b) Questions Involved.

The principal questions involved in this appeal may be summarized as follows:

1. Where a foreign corporation has not qualified to transact intrastate business in a state and has not transacted such business there so as to subject it to the state's jurisdiction, and in such state is engaged solely in selling goods in interstate commerce to purchasers within such state, can the state lawfully require the corporation, in connection with such sales in interstate commerce, to collect and pay to the state a tax, imposed by the state upon use,

storage, or consumption of the goods within the state which can arise only after the goods have left the seller's possession and the interstate transaction is completed?

2. Will the enforcement of the state statute by the appellees in the manner threatened deprive the appellant of its property without due process of law?

(c) Summary of Statute Involved.

The pertinent portions of the statute are printed in the appendix hereto annexed. Various terms and phrases used in the Act are defined in section 2. Included among these is the word "retailer." [R. 29-31]

Section 3 imposes an excise tax on the storage, use or other consumption in California of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in said state, at the rate of 3% of the sales price of such property. Every person storing, using or otherwise consuming in said state such property so purchased is liable for the tax until it is paid to the state; provided that a receipt from a retailer maintaining a place of business in said state or authorized by the State Board of Equalization (referred to as the Board) given to the purchaser pursuant to the Act shall be sufficient to relieve the purchaser from further liability for the tax covered by the receipt. [R. 31-32]

Section 4 specifically exempts the storage, use or consumption of various classes of tangible personal property, including, among others, (a) property, the gross receipts from the sale of which are subject to chapter 1020, Statutes of 1933 (the California Retail Sales Tax Act of 1933) and any amendments thereto; and (b) property, the storage, use or other consumption of which the state is

prohibited from taxing under the Constitution or laws of the United States or under the Constitution of California: and the exemption specified in section 47 relates to certain vessels. [R. 32-34]

Every retailer selling tangible personal property for storage, use or other consumption in California is required to register with the Board within thirty days after the effective date of the Act and give the name and address of all agents operating in the state, the location of any and all distribution or sales houses or offices or other places of business in this state and such other information as the Board may require. [Section 5, R. 34]

Every retailer maintaining a place of business in such state and making non-exempt sales of such property shall at the time of making such sales or, if the storage, use or other consumption of such property is not then taxable, at the time it becomes taxable under the Act, collect the tax from the purchaser and give a receipt therefor; and the tax so required to be collected by the retailer shall constitute a debt owed by the retailer to the state. [Section 6, R. 34]

Every retailer maintaining a place of business in the state is required by section 7 to file with the Board quarterly returns in such form and showing such information as may be required by the Board, accompanied by the amount of the tax required to be collected by the retailer during the period covered by the return. The Board is given discretionary power to require returns and payment of taxes for other than quarterly periods. Every person purchasing property, the storage, use or consumption of which is subject to the tax and who has not paid the tax to a retailer required or authorized to collect the tax, must

file with the Board a return accompanied by a remittance of the amount of tax imposed and not paid to a retailer. [R. 35]

Section 8 provides that in the event of delinquency in payment a penalty of 10% thereof plus interest at the rate of ½ of 1% per month or fraction thereof shall become due and payable to the state. [R. 37]

Additional determinations, arbitrary determinations and jeopardy determinations are provided for by sections 9, 10 and 11, respectively. [R. 37-39] Redetermination of amounts determined under sections 9 or 10, and procedure with respect thereto are treated in section 12. [R. 39-40]

By section 14 the Board is empowered to require the deposit with it of such security as it may determine, and to sell the same, after notice of sale served on the depositor personally or by mail. [R. 40]

Summary proceedings are authorized whereby the Board may file with any county clerk a certificate specifying a delinquency, and such clerk shall immediately thereupon enter a judgment, an abstract or copy of which when recorded is given the force, effect and priority of a judgment lien against real property; and execution shall issue thereon at the request of the Board as in the case of other judgments. The Board is authorized to give notice of delinquency by registered mail to persons possessing or controlling any credits or other personal property of, or owing debts to, the delinquent; and thereafter no transfer or other disposition thereof shall be made without the Board's consent or the lapse of twenty days. Persons so notified must within five days advise the Board of any and all such credits, personal property or debts possessed, controlled or owed by them. The Board is granted the further power

to seize and sell at public auction and convey title to any property of the delinquent, after giving notice by mail and by publication. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. [Section 20, R. 43-46]

Section 21 provides that every retailer shall keep such records, receipts, invoices and other pertinent papers in such form as the Board may require, and authorizes the examination thereof by the Board and its agents. [R. 46]

Section 23 relates to the disposition of amounts paid to the Board. [R. 47]

Section 24 requires that the State Attorney General prosecute actions to recover delinquent amounts due under the Act, with penalties and interest, and provides that in any action brought under the provisions of the Act, process may be served according to the provisions of the Code of Civil Procedure, and the Civil Code of the state, "or may be served upon any agent or clerk in this state employed by any retailer in a place of business maintained by such retailer in this state, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office." [R. 48-49]

Section 25 forbids the issuance of any injunction, writ of mandate or other process to prevent or enjoin collection of any tax therein required to be collected, and provides but one forum for the recovery by legal action of taxes paid under protest, namely, a court of competent jurisdiction in the County of Sacramento. [R. 49-50]

Section 26. relates to penalties and makes failure or refusal to furnish any return required by the Act, or to

furnish a supplemental return or other data required by the Board, a misdemeanor punishable by a fine of not exceeding $500 for each offense. [R. 50]

The Board is charged (Section 21) with the enforcement of the provisions of the Act and is empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement thereof. [R. 46]

Ruling No. 6 of the rules and regulations under said Act, issued by the Board, effective July 1, 1935, provides:

> "'Place of business' means an office or other premises regularly used by a retailer for the transaction of business.
>
> "Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives." [R. 14]

(d) Appellant's Operations.

Appellant is an Illinois corporation engaged in manufacturing comptometers at Chicago, Illinois, and selling them throughout the United States. [R. 4] It has not engaged in, nor qualified for the transaction of, intrastate business in the State of California. [R. 6]

The method employed by appellant in making sales of its product to California purchasers follows the usual pattern for transactions in interstate commerce. [R. 4-6] Orders for goods are solicited by or under the direction of two territorial agents, having exclusive soliciting rights in

the northern and southern portions, respectively, of the State of California. These agents receive no salary, but are paid commissions based on sales made by appellant pursuant to orders solicited by them and their employees. Each of the two agents maintains an office within his allotted territory, for the convenience of himself and his employees. Appellant is the lessee of said offices and pays the rental thereof. All other expenses of maintaining said offices are paid by the respective agents who occupy them. [R. 4-5]

Each order for appellant's product obtained by either of said agents is forwarded to appellant's head office at Chicago, Illinois, where, if it meets with the approval of appellant's officers, it is accepted and delivered to appellant's shipping department. The shipping department then appropriates a machine to the order and notes on the order the number of the machine so appropriated; and a memorandum is sent to the general agent who forwarded the order, setting forth descriptive details of the machine, the date of shipment and the name of the purchaser. [R. 5]

All machines sold for delivery in California are shipped either from appellant's Chicago plant or from one of its other distributing points without the State of California. Machines are shipped either directly to the purchaser or, in order to secure reduced freight rates, in group shipments to the general agents, who make delivery thereof to the respective purchasers, whose names appear on tags attached thereto prior to shipment. [R. 5]

Approximately seven days after a machine is shipped from Chicago a bill therefor is sent from appellant's Chicago office directly to the purchaser, who is instructed to make payment directly to appellant in Chicago. Neither the general agents nor their subagents have any authority to make a direct sale of appellant's machines, or to enter into a contract binding plaintiff to sell one, or to render a bill for a machine, or to accept payment for a machine. Appellant keeps no machines in California for sale. [R. 6, 23-28]

During the entire period from July 1, 1935 to the date of the commencement of suit herein all sales of appellant's machines to purchasers for storage, use or other consumption in California were made in the manner aforesaid. [R. 6] Appellant has not collected any tax from its California customers, nor has it filed any use tax returns with the appellee Board. [R. 15]

(e) Proceedings Prior to Decree Below.

Under date of July 23, 1937 the appellee Board notified appellant of a determination of use tax on sales made by appellant to California purchasers during the one-year period commencing July 1, 1935, in the sum of $4,457.42, plus interest in the sum of $390.94 and penalties in the sum of $445.74. Thereupon in due course the appellant exhausted the administrative remedies available under the terms of the statute, by filing and prosecuting before the Board a petition for redetermination. After a hearing the Board on October 8, 1937 redetermined the amount due, in the sum of $5,338.68, with interest at the rate of

$22.29 for each month or fraction thereof after October 15, 1937, and an additional penalty of $445.74 if not paid by November 14, 1937. [R. 57]

Suit herein was commenced on November 12, 1937. Appellant alleged facts in support of the jurisdiction of the District Court under subdivisions 1 and 14, respectively, of Section 24 of the Judicial Code. (28 U. S. C. A. Sec. 41, subds. 1 and 14), [R. 3, 63] and asserted that the state statute as construed and applied by the appellees constitutes a regulation of and a direct burden upon interstate commerce, in violation of Article I, Section 8, Clause 3, of the Constitution of the United States, and deprives appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and Section 13 of Article I of the Constitution of the State of California. [R. 3, 17]

The District Court issued a temporary restraining order and order to show cause why an interlocutory injunction should not be granted according to the prayer of the bill of complaint. [R. 52, 63] After due notice to the appellees and the Governor of California, [R. 54] the application for interlocutory injunction was heard before a three-judge court pursuant to Section 266 of the Judicial Code, 28 U. S. C. A. Sec. 380. At that hearing the appellees filed a return to the order to show cause, restraining order and application, and a motion to dismiss the bill of complaint and cause upon the grounds that there was insufficiency of facts, lack of jurisdictional amount, lack of a Federal question; that the action is against the State of California; that the court was without jurisdiction to en-

tertain the bill or grant the relief sought; that the bill does not entitle plaintiff (appellant) to any relief in equity, and a lack of showing of irreparable injury. [R. 55]

The application for interlocutory injunction and the motion to dismiss were presented and argued by counsel for the respective parties and taken under submission by the District Court, without the presentation of any evidence and without consideration of any issues raised by the appellees' return. [R. 63]

Appellant's application for an interlocutory injunction was denied, and appellees' motion to dismiss was granted. [R. 69] The opinion of the court below [R. 58-68] shows that the court's action was based upon its conclusion that the statute under consideration does not violate either the commerce clause or the Fourteenth Amendment of the Federal Constitution and that the state may require the appellant as seller to collect the use tax and in connection therewith require the seller to conform to certain regulations in order to insure collection of the tax. The appeal herein is taken from the decree based on those rulings of the District Court. [R. 70]

The effect of the lower court's decision is to hold that, in spite of the fact that appellant is a foreign corporation and that its business in California is exclusively interstate in character, California may nevertheless impose upon the appellant all of the burdens and duties prescribed by the state statute for retailers, including the duty of collecting from the appellant's California customers and paying to the state the use tax which those customers owe to the state, and in that connection may compel the appellant to conform to other provisions and regulations in order to insure the state's collection of the tax.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The assigned errors intended to be urged upon this appeal are:

1. The court erred in sustaining the motion of the defendants herein to dismiss the plaintiff's bill of complaint and cause of action and in dismissing the said bill and cause of action.

2. The court erred in denying, after due notice and hearing, the application of the plaintiff for an interlocutory injunction in said cause.

3. The court erred in concluding from the facts found, and in ordering, that the action must be dismissed, and in entering its decree against the plaintiff and in favor of the defendants; for the reason that the facts found do not support said conclusion or said decree.

4. The court erred in concluding and deciding from the facts found that the State of California may require the plaintiff to collect and pay the tax imposed by the California Use Tax Act, and in connection therewith may require the plaintiff to conform to the regulations of the defendants in order to insure the collection and payment of said tax.

5. The court erred in concluding from the facts found that the decision in the case of *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, is controlling in this cause.

6. The court erred in concluding from the facts found that the plaintiff's method of selling its comptometers to California purchasers does not entitle it to exemption from the application of the California Use Tax Act of 1935.

7. The court erred in concluding from the allegations of the plaintiff's bill of complaint, which constitute the findings of fact, that plaintiff's method of doing business includes maintaining at least two places, or any place, of business in California.

8. The court erred in concluding from the facts found that the plaintiff was maintaining any place of business in California so as to subject the plaintiff to the provisions of the California Use Tax Act of 1935.

9. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, violates the provisions of the commerce clause (Art. 1, sec. 8, subd. 3) of the Constitution of the United States.

10. The court erred in failing to conclude from the facts found that the California Use Tax Act of 1935, as amended, and as construed and applied by the defendants to the plaintiff herein, deprives the plaintiff of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and of Article I, Section 13, of the Constitution of the State of California.

11. The court erred in failing to conclude that plaintiff's bill of complaint states sufficient grounds for the injunctive relief therein prayed for, when tested by a motion to dismiss the same.

The foregoing assignments of error are reducible to two main propositions, namely: (1) The state statute as construed and applied by the appellees to the appellant is repugnant to clause 3 of section 8, Article I, commonly known as the "commerce clause," of the Constitution of the

United States; and (2) The threatened enforcement by the appellees of the provisions of said statute would deprive the appellant of its property without due process of law, in violation of the Fourteenth Amendment of said Constitution.

V.

SUMMARY OF ARGUMENT.

The three cases upon which the lower court relied as authority for the denial of the injunctive relief sought by the appellant herein are not applicable to the case at bar. In each of those cases the corporation subjected to the tax was within the jurisdiction of the taxing state and was transacting an intrastate business there. The appellant, an Illinois corporation, carried on no intrastate operations in California and is not subject to its jurisdiction. Such business as the appellant transacts in California is interstate in character. California, therefore, lacks the power to require the appellant (1) to act as the state's collecting agent with respect to use tax which may become due from California storers, users or consumers, or (2) to insure payment of such tax if it fails to make collection from the tax debtors, or (3) otherwise to act as a "retailer" as defined by the Act and the appellees. The treatment of the appellant as a retailer subject to the provisions of the California Use Tax Act is a direct burden upon interstate commerce and as such is prohibited by the Constitution. Numerous provisions of the statute, if applied to the appellant, would deprive it of its property without due process of law. The action of the lower court in denying injunctive relief to the appellant therefore was erroneous.

VI.

ARGUMENT.

POINT I.

This Case is Distinguishable on its Facts From, and is Not Governed by, the Cases Relied Upon by the Lower Court in Denying the Relief Sought by the Appellant.

The decision of the lower court is based upon the court's expressed inability "to distinguish the statute here involved from the one upheld in the case of *Monamotor Oil Co. v. Johnson,* 292 U. S. 86," and its further inability "to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of this statute," and, finally, upon its conclusion, from the allegations of the bill, "that plaintiff's method of doing business includes maintaining at least two places of business in California." [R. 67-68].

The opinion of the lower court reveals that, in deciding against the appellant, that court relied entirely upon three decisions by the Supreme Court of the United States, namely: *Henneford v. Silas Mason Co.,* 300 U. S. 577; *Bowman v. Continental Oil Co.,* 256 U. S. 642, and *Monamotor Oil Co. v. Johnson,* 292 U. S. 86.

After discussion of those three decisions, the opinion below proceeds to state [R. 67]:

> "These decisions make it clear that a State law, such as the one here under attack, in so far as it imposes a use tax upon personal property after the same has been brought into the State, does not violate either the commerce clause or the Fourteenth Amendment of the Federal Constitution."

The statement itself is not clear. Section 6 of the statute in question by its terms imposes an excise tax "on the storage, use or other consumption * * * of tangible personal property," rather than on the property itself. Furthermore, the statement wholly ignores the factor of jurisdiction of the taxing state over some definite and tangible taxpayer.

None of those three cases involved the question, here presented, of the right of a state to regulate or burden the interstate commerce of a party which had not submitted itself to the jurisdiction of such state, and whose activities in such state are confined to interstate commerce.

In the case first referred to, Silas Mason Co., while engaged in intrastate business in the State of Washington, used personal property, which had been bought at retail in other states "long after the time when delivery was over," (p. 583). That case involved the right of the state to enforce the provisions of its use tax law against those who *use* personal property *after* it has become part of the common mass of property within the state of destination, even though it was acquired in interstate commerce. One of the cases there cited in support of that principle is *Monamotor Oil Co. v. Johnson*, 292 U. S. 86. However, that question is not here involved.

The tax can not attach until the interstate transaction, whereby the goods are introduced into the State of California, has come to an end. If thereafter a purchaser stores, uses or consumes the goods within the state such

storer, user or consumer becomes liable to the state for the use tax imposed by the statute in question, and is required to file a return and pay the tax, if it has not already been paid to a retailer. The appellant does not dispute the right of the appellees to collect the tax from such storer, user or consumer. It does, however, emphatically dispute their right to compel the appellant to serve as their collection agent and otherwise perform the duties to which retailers *within the jurisdiction of the state* are subjected.

In neither *Bowman v. Continental Oil Co.*, 256 U. S. 642, nor *Monamotor Oil Co. v. Johnson*, 292 U. S. 86 was the corporation carrying on an exclusively interstate business in the state whose statute was under consideration. In the opinion rendered in each of those cases it clearly appears that the corporation involved was carrying on intrastate business which subjected it to the jurisdiction of the state in which such business was carried on. The opinion of the lower court in the *Monamotor Oil Co.* case, reported in 3 Fed. Supp. 189, which was approved by the Supreme Court, reveals a factual background readily distinguishable from that in the case at bar. At page 199 of that opinion the lower court said:

> "Upon consideration of the entire act the intention of the Legislature is readily apparent: First, a levy is made upon all motor vehicle fuel used or consumed in the state; second, the person or persons using the fuel within the state are made liable for the payment of the fees; third, a refund is granted to users of such motor vehicle fuel other

than users on the public highways; and, fourth, the distributor *for the privilege of selling and dispensing of gasoline within the state of Iowa* is to be a toll collector and administer the collection of the tax making his reports as required by section 5093-a5, and in either paying or advancing the tax on the 20th day of the month following that on which the gasoline was imported and unloaded by him."

* * * * * * * * *

"A distributor of gasoline has no inherent rights to sell and dispense gasoline *in the State of Iowa* and, on account of the nature of the product that he handles, the state has a right to require of him *in consideration of his right to dispense gasoline within the state* the administrative acts as provided by the statutes. * * *" (Emphasis supplied.)

That language clearly relates to the power of a state over a person *acting within its boraers* and with respect to an article which is properly the subject of the exercise of the police power. Any doubt that the District Court and the Supreme Court in the *Monamotor Oil Co.* case were not dealing with a question of interstate commerce is dissipated by paragraph XI of the findings made by said District Court, which appears on page 109 of the record in the Supreme Court and is as follows:

"XI. That *as a part of the business conducted in Iowa* by said Mona Motor Oil Company, *said Company imports into Iowa from other States* in tank cars and other containers and by tank trucks said gasoline and delivers the same to certain other distributors and dealers in the State of Iowa. *That said importation of gasoline is a part of the general business regularly conducted by the Mona Motor Oil Company in the State of Iowa. That the sales*

> *are made in Iowa* and is what is commonly termed a jobbing business of gasoline whereby the Mona Motor Oil Company supplies other distributors and dealers with gasoline in wholesale quantities shipped from points outside of the State of Iowa and that such business is now being conducted by the Mona Motor Oil Company in the State of Iowa and amounts to many thousand dollars per month." (Emphasis supplied.)

The cases cited by the Supreme Court, at page 94 of its opinion in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, clearly relate to intrastate transactions, in which jurisdiction of the state to regulate was present. The court stated, furthermore, (p. 94) that:

> "The intent is not to affect interstate commerce,"

and (p. 95):

> "The statute obviously was not intended to reach transactions in interstate commerce."

See also,

> *Iowa v. Standard Oil Co.*, ... Iowa ..... 271 N. W. 185:
>
> *Iowa v. Phillips Pet. Co.* ..... Iowa ..... 271 N. W. 192. (Appeal dismissed for want of substantial Federal question, 302 U. S. 646) involving the same statute as that under consideration in *Monamotor Oil Co. v. Johnson*, ***supra.***

It is respectfully submitted that, to the extent that the portion of the affirming opinion in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, which was quoted by the lower court herein, may superficially appear to extend the scope of the decision in that case so as to include a shipper,

who is beyond the state's jurisdiction, as an agent of such state, then to that extent it must be regarded as *obiter dictum* which is ineffective to overrule the great mass of authority which denies to a state extraterritorial jurisdiction, as well as the power to regulate or burden interstate commerce.

There appears to be nothing in the language quoted by the lower court from *Bowman v. Continental Oil Co.*, 256 U. S. 642, to justify its application to the interstate transactions of a corporation which has not submitted itself to the state's jurisdiction, either by qualifying for or engaging in intrastate business within such state. That language indicates merely that a corporation, having submitted itself to a state's jurisdiction and conducted extensive intrastate activities therein, may be compelled to furnish the information necessary to segregate, for excise taxation purposes, such intrastate business from its interstate business, which latter was definitely and expressly recognized as being beyond the state's power to tax.

That this vital distinction was not recognized by the court below is apparent from the closing lines of its opinion. It is noteworthy that the court stated that it was unable to distinguish the *statute* here involved from the one involved in *Monamotor Oil Co. v. Johnson*, 292 U. S. 86. Similarity of the statutes alone cannot be a sufficient basis for regarding that case as controlling the decision in the case at bar. Even if the statutes are similar, it is obvious that their application to dissimilar facts does not require similar results. Especially, is this true in any case, such as the one at bar, where such results could be reached only by overturning a vast body of deep-rooted constitutional law.

POINT II.

THE CALIFORNIA USE TAX ACT AND THE PROCEEDINGS OF THE APPELLEES UNDER IT, AGAINST THE ENFORCEMENT OF WHICH INJUNCTIVE RELIEF IS SOUGHT, ARE IN DIRECT CONFLICT WITH THE COMMERCE CLAUSE OF THE CONSTITUTION.

The lower court, as a further ground for its decision, expressed its inability to perceive wherein the plaintiff's method of selling its comptometers to California purchasers entitles it to exemption from the application of the statute here involved.

The lower court's conception of the scope and applicability of the three cases hereinabove referred to, and particularly *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, appears very definitely to have constituted the cause of the asserted failure of perception,—rather than any lack of showing of facts in the present case.

The District Court expressed no hesitancy or doubt as to the jurisdictional showing made by the appellant. Its decision is bottomed upon the proposition that *Monamotor Oil Co. v. Johnson*, 292 U. S. 86, compels the conclusion that no unconstitutional regulation of interstate commerce results from the facts shown in this case.

The facts stated in the complaint are deemed admitted upon the appellees' motion to dismiss. *Askren v. Continental Oil Co.*, 252 U. S. 444, 448, and must be taken as

the findings of fact required by Equity Rule 70½, 28 U. S. C. A. following Sec. 723.

Cottman v. Dailey, 20 F. Supp. 142, 145. Certiorari denied 289 U. S. 750;

Grandin Farmers' etc. Co. v. Langer, 5 F. Supp. 425, affirmed 292 U. S. 605.

See, also,

Baltimore & Ohio R. Co. v. U. S. A., 264 U. S. 258, 262-3.

They were so taken and adopted by the decree of the lower court. From them it is apparent that all sales made by the appellant to California purchasers constitute interstate commerce in its essence.

Sonneborn Bros v. Keeling, 262 U. S. 506, 515;

Real Silk Hosiery Mills v. Portland, 268 U. S. 325;

Carter v. Carter Coal Co., 298 U. S. 238, 303;

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147;

Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489;

Charlton Silk Co. v. Jones, 190 Cal. 341, 212 Pac. 203;

Palmer v. Aeolian Co. (C. C. A. 8), 46 F. (2d) 746. Certiorari denied, 283 U. S. 851.

The essential interstate nature of such sales is not destroyed by the fact that the orders upon which the sales are based are solicited by persons stationed or residing in

California, nor by the fact that such solicitors occupy offices within that state under the conditions herein found.

Paramount Pictures Dist. Co. v. Henneford, 184 Wash. 376, 51 Pac. (2d) 385, Cert. den. 298 U. S. 665;

Cheney Bros. Co. v. Massachusetts, 246 U. S. 147;

Sonneborn Bros. v. Keeling, 262 U. S. 506;

Ozark Pipe Line Co. v. Monier, 266 U. S. 555;

McCall v. California, 136 U. S. 104, 112;

Norfolk & Western R. Co. v. Pennsylvania, 136 U. S. 114.

Nor is their essential nature as interstate commerce destroyed by reason of the fact that in some instances, in order to effect freight economies goods may be combined and shipped to one of the appellant's representatives in California for delivery to the purchasers, instead of being shipped directly to each individual purchaser.

Davis v. Virginia, 236 U. S. 697;

Crenshaw v. Arkansas, 227 U. S. 389;

Dozier v. Alabama, 218 U. S. 124;

Rearick v. Pennsylvania, 203 U. S. 507;

Calawell v. North Carolina, 187 U. S. 622;

N. L. R. B. v. National etc. Co., 86 Fed. (2d) 98, 99.

Arrangements made between seller and purchaser with respect to the place of taking title or as to payment of

freight, where the actual movement is interstate, do not affect the power of Congress to regulate interstate commerce.

Santa Cruz etc. Co. v. N. L. R. B., 303 U. S. 453, 82 L. ed. 653, 656;

Pennsylvania R. Co. v. Clark Bros. Co., 238 U. S. 456, 466.

The states cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it, or upon persons or property in transit in interstate commerce. They have no power to exclude from the limits of the state corporations or others engaged in interstate commerce, or to fetter by conditions their right to carry it on.

Minnesota Rate Cases (*Simpson v. Shepard*), 230 U. S. 352, 400-401.

"A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause." (Citing cases.)

Dahnke-Walker Co. v. Bondurant, 257 U. S. 282, 291.

"It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business."

Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 218.

See, also,

Anglo-Chilean etc. Corp. v. Alabama, 288 U. S. 218.

It is the established doctrine of the Supreme Court that a state may not, in any form or under any guise, directly burden the prosecution of interstate commerce.

International Textbook Co. v. Pigg, 217 U. S. 91;

Helson v. Kentucky, 279 U. S. 245;

Baldwin v. G. A. F. Seelig Inc., 294 U. S. 511.

In *Helson v. Kentucky, supra,* the court said (pp. 248-9):

> "Regulation of interstate and foreign commerce is a matter committed exclusively to the control of Congress, and the rule is settled by innumerable decisions of this court, unnecessary to be cited, that a state law which directly burdens such commerce by taxation *or otherwise*, constitutes a regulation beyond the power of the state under the Constitution." (Emphasis supplied.)

The burden laid on interstate commerce by a tax is deemed direct where the tax lays a burden upon every transaction in such commerce by withholding for the use of the state a part of every dollar received in such transaction. That such is the law is admitted in the dissenting opinion in *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 297.

It follows that the exaction from the appellant, for the use of the state of California, of three cents of every dollar representing the purchase price of goods sold by the appellant in interstate commerce with California customers, is a direct burden on such interstate commerce.

In *Henneford v. Silas Mason Co.*, 300 U. S. 577, there is a clear recognition in the majority opinion that there are limits beyond which a state may not encroach in the administration of its use tax statutes. For example, it is stated (p. 583):

> "* * * A tax upon a use so closely connected with delivery as to be in substance a part thereof might be subject to the same objections that would be applicable to a tax upon the sale itself."

A fortiori, the incidence of the tax cannot lawfully precede the termination of the interstate journey.

Again, after holding (p. 583) that in that case the tax upon the use after the property is at rest is not so measured or conditioned as to hamper the transactions of interstate commerce or discriminate against them, the court states (p. 586):

> "* * * A tariff whether protective or for revenue, burdens the very act of importation, and if laid by a state upon its commerce with another is equally unlawful whether protection or revenue is the motive back of it."

There, also (pp. 585-586) Mr. Justice Cardozo distinguished that case from *Baldwin v. Seelig*, 294 U. S. 511, pointing out that in the latter case:

> "* * * New York was attempting to project its legislation within the borders of another state by regulating the price to be paid in that state for milk acquired there. She said in effect to farmers in Vermont: Your milk cannot be sold by dealers to whom you ship it in New York unless you sell it to them in Vermont at a price determined here."

By the same token, California through the appellees has said to the appellant:

> "Your comptometers cannot be sold by you in Illinois to purchasers in California unless you act as collector of our use tax, register as a retailer, and as such comport yourself in accordance with such rules and regulations as we may in our discretion deem 'necessary for the efficient administration of this act.'"

By such registration the appellant would become personally liable in debt to the state for the payment of use taxes levied upon machines shipped into the state from outside points.

> *Endrezze v. Dorr Co.* (C. C. A. 9) 97 Fed. (2d) 46, 48.

Furthermore, the statute, as administered by the appellees, compels the appellant to insure payment of the use tax owed by its California customers; and places the burden of the tax on the appellant if and to the extent that it fails to obtain payment from such customers.

In *Baldwin v. Seelig,* 294 U. S. 511, the court observed (p. 522) that nice distinctions between direct and indirect burdens are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states.

A use tax or compensating tax is designed to reach purchasers who acquire personal property in other states for use at home.

> *Henneford v. Silas Mason Co.,* 300 U. S. 577, 581.

It is settled that the generality and nondiscriminatory character of a tax will not save it if it directly burdens interstate commerce.

J. D. Adams Mfg. Co. v. Storen, 82 L. ed. 870, 873.

State statutes levying taxes or license fees are not the only ones which have been condemned for violation of the commerce clause of the Federal Constitution. Following are illustrations of other types of unlawful burdens on interstate commerce:

(a) A statute requiring a foreign corporation engaged in interstate commerce as a condition to doing business in the state to file a detailed statement of financial condition with the Secretary of State.

Buck's Stove & Range Co. v. Vickers, 226 U. S. 205;

International Textbook Co. v. Pigg, 217 U. S. 91.

(b) A statute requiring a foreign corporation engaged in interstate commerce to file a certificate designating a principal place of business within the state and appointing resident agents.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727.

(c) A statute requiring a foreign corporation, as a condition precedent to its right to sue in the state courts, to appoint a resident agent and file a copy of its charter with the Secretary of State.

Sioux Remedy Co. v. Cope, 235 U. S. 197.

(d) A statute requiring that an interstate carrier, in order to avail itself of a contract right of exemption from liability, must trace the freight and inform the shipper in writing when, where, how and by what carrier the freight was lost or damaged, and give the names and positions of the persons by whom the truth of such information can be established.

Central of Georgia Ry. Co. v. Murphey, 196 U. S. 194.

Consider then, in the light of the foregoing decisions, the following requirements of the statute, as construed and threatened to be applied by the appellees to the appellant:

The appellant must:

Register with the Board of Equalization, furnish the information specified in section 5 of the Act and give such other information as the Board may require.

Determine whether or not and when, if ever, the storage, use or other consumption of the property, which it sells in Illinois and ships into California, becomes taxable under the Act; and, when it becomes taxable, collect the tax and give the purchaser a receipt therefor.

File returns quarterly, or otherwise as the Board may require, showing the sales price of property sold, the storage, use or consumption of which became subject to the tax imposed by said Act during the preceding taxable period.

Be subject to penalties and interest, in the event of failure to obey the statute (Section 8); and arbitrary determinations of tax (Section 9); and criminal charges (Sections 26 and 27).

Be subject to the requirement of such security for payment of tax as the Board may determine, and to the sale of such security.

Be subject to summary judgment and execution, without suit or service of process. (Section 20.)

Be subject to the risk of loss of the unsold portion of any property seized and left at the place of sale. (Section 20.)

It should be noted that the maintenance of a place of business in California is not a prerequisite to some of the aforesaid forms of regulation.

The aforesaid burdens seem to be as objectionable as those condemned by the decisions of this Honorable Court, hereinabove cited. But the provisions of section 6 of the Act, in particular, reveal a practical difficulty,—with respect to ascertaining the time of the accrual of the tax,—which a foreign corporation, such as the appellant is here shown to be, cannot meet except by the expenditure of much time and money. Obviously, the tax cannot accrue until some time after the interstate transaction is completed. To compel an Illinois seller to follow up each sale to a California purchaser, after the goods have been delivered, in order to ascertain whether that purchaser is storing, using or consuming them in a manner which calls for the incidence of the tax, would require a legal and accounting staff of extremely burdensome proportions.

The lower court's decree is further expressly based upon the conclusion that the appellant's method of doing business includes maintaining at least two places of business in California.

This conclusion accepts as valid the phraseology of Ruling No. 6 of the appellee Board of Equalization, which reads:

> " 'Place of business' means an office or other premises regularly used by a retailer for the transaction of business.
>
> "Any person making sales of tangible personal property for storage, use or other consumption in this State maintains a place of business here if orders are solicited in this State by his agents or representatives occupying an office or other premises in this State regardless of whether such place of business is maintained under the name of such person or under the names of his agents or representatives." [R. 14]

Thus the statute, as interpreted by the appellees and the lower court, sweeps within its purview all persons and corporations, regardless of their actual absence from the state, and makes them amenable to the state for the purposes of taxation and regulation if orders are solicited in this state by an agent or representative occupying an office or other premises in the state.

Such an interpretation cannot be reconciled with the interpretation of the commerce clause of the Federal Constitution which has consistently been sustained by the courts of this country.

An analogous situation has frequently arisen in patent infringement cases, where the question of jurisdiction over a nonresident defendant depended on whether the defendant had a "regular or established place of business" within the district. These cases hold that the presence of order solicitors engaged in interstate commerce in a state and the furnishing of office facilities for such

solicitors do not create for the foreign principal of such solicitors the status of having a regular or established place of business.

W. S. Tyler Co. v. Ludlow Saylor Wire Co., 236 U. S. 723;

American etc. Co. v. Lalance etc. Co., 256 Fed. 34;

Root v. Samuel Cupples Env. Co., 36 Fed. (2d) 405;

Elevator Supplies Co. v. Wagner Mfg. Co., 54 Fed. (2d) 937;

Remington Rand v. Acme Card System Co., 71 Fed. (2d) 628;

American Sales Book Co. v. Atlantic Reg. Co., 14 Fed. Supp. 623.

The applicability of those cases to a situation which does not involve patent infringement clearly appears from *Davega, Inc., v. Lincoln Furniture Mfg. Co., Inc.* (C. C. A. 2), 29 Fed. (2d) 164. That case involved the question of sufficiency of service of process in New York upon the officer of a Virginia corporation who was temporarily in New York. In affirming the dismissal of the action the court stated (p. 166):

> "* * * It has been definitely determined that the mere renting of an office and solicitation of business in the foreign state is insufficient to subject the corporation to service of process."

and cited, *inter alia*, the case of *W. S. Tyler Co. v. Ludlow-Saylor Wire Co., supra*. Thereupon the court added:

> "* * * Nor is the fact (if it be the fact, which is disputed) that the cause of action here arose in New York material, unless the corporation was doing business *in the sense that is required to subject it to jurisdiction.*" (Emphasis supplied.)

In *Thurman v. Chicago M. & St. P. Ry.*, 254 Mass. 569, 151 N. E. 63, 46 A. L. R. 563, Mr. Chief Justice Rugg, in the course of an able and exhaustive review of cases on the subject of state jurisdiction where interstate commerce is involved, said for the court:

> "* * * A foreign corporation may be doing business within a state to such an extent as to be liable to service of process and thus subject to its jurisdiction, and yet not liable to taxation or other undue burdens upon interstate commerce. The distinction between presence of a foreign corporation for service of process because doing business even exclusively interstate in nature, and its absence for purposes of taxation although doing such business, is well established." (Citing cases.)

It is thus apparent from numerous decisions of this Court that, even if it be conceded that the appellant maintains a place of business in the State of California, within the definition contained in Ruling No. 6 of the appellee Board, it by no means follows that the appellees, or the state itself, can by mere *ipse dixit* burden or regulate a foreign corporation whose only business within the state's borders is interstate commerce.

That *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, and *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, are still good law is apparent from recent decisions of this Honorable Court. *Atlantic Lumber Co. v. Commissioner*, 298 U. S. 553, 555; *Atlantic Refining Co. v. Virginia*, 302 U. S. 22, 82 L. ed. 52, 58, (Footnote No. 3).

POINT III.

The Procedure Prescribed by the State Statute for Enforcement of Its Provisions Is, With Respect to the Appellant, Repugnant to the Due Process Provision of the Fourteenth Amendment of the Federal Constitution.

In the absence of the protection of an injunction against the appellees, the appellant is liable to be proceeded against in accordance with the state law.

Graves v. Texas Co., 298 U. S. 393, 402.

Thus, according to the terms of the statute under which the appellees claim authority to proceed herein, the appellees, under section 10, may make and have made arbitrary determinations of liability against the appellant, based upon estimates, may add penalties, and may depend upon the mail as a means for serving notice of its action. If any amount so determined is not paid the appellee Board may, under section 20 of the act, by merely filing a certificate, cause the entry, by the clerk of any county of the state, of a "special judgment". Upon recordation of an abstract or copy of such judgment the amount thereof constitutes a lien upon any real property of the appellant in the county where such recordation is made. Execution shall issue upon such a judgment, upon request of the Board, in the same manner as execution may issue upon other judgments, and sales may be held under such execution.

Other provisions of section 20 of the act purport to sanction the tying-up of a delinquent's accounts and personal property, the seizure and sale of real and personal property, and the leaving at the place of sale, at the risk of the delinquent, of the unsold portion of any property so seized.

Section 24 provides that, in any action brought under the provisions of the act, process may be served according to the provisions of the codes of the state, or may be served upon any agent or clerk of this state employed by any retailer in a place of business maintained by such retailer in the state, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office. When that provision is combined with the definition of maintenance of a place of business, contained in Ruling No. 6 of the appellee Board [R. 14], it appears that the attempted jurisdiction of California over nonresident retailers is virtually without limit.

We think that it may be said of this statute, as it was said of the statute involved in *Truax v. Corrigan*, 257 U. S. 312, at p. 328:

> "A law which operates to make lawful such a wrong as is described in the plaintiff's complaint deprives" (the plaintiff) "of his property without due process, and cannot be held valid under the Fourteenth Amendment."

Corporations are persons within the meaning of the Fourteenth Amendment forbidding the deprivation of property without due process of law.

Connecticut General etc. Co. v. Johnson, 303 U. S. 77.

In the recent case of *National Ice & Cold Storage Co. v. Pacific Fruit Express Co.*, 95 Cal. Dec. 442, 79 Pac. (2d) 380, the Supreme Court of California branded as a denial of due process the compelling of one person to pay the debt of another. The provision of the California Retail Sales Act of 1933, Stat. 1933, p. 2600, there held unconstitutional, purported to authorize the retailer of tangible personal property to pass on to the purchaser thereof the tax imposed on the retailer for the privilege of selling such property.

It is no less a violation of the Fourteenth Amendment to provide by section 6 of the Use Tax Act that the tax therein required to be collected by the retailer (which is the excise tax imposed by section 3 on storage, use or other consumption, and for which the storer, user or consumer is declared liable) "shall constitute *a debt owed by the retailer to this state*". (Emphasis supplied.)

To assume jurisdiction of a person against his protest where no jurisdiction exists is denial of due process of law.

Thurman v. Chicago etc. Co., 254 Mass. 569, 151 N. E. 63, 46 A. L. R. 563, 568.

See, also:

Riverside etc. Mills v. Menefee, 237 U. S. 189;

McDonald v. Mabee, 243 U. S. 90;

Hess v. Pawloski, 274 U. S. 352, 355.

The legislation of a state can only apply to persons and things over which the state has jurisdiction.

Gibson v. Chantreau, 80 U. S. 92, 99.

The legislative and judicial authority of a state is bounded by the territory of that state.

Wilkinson v. Leland, 2 Pet. 627, 655.

"Before a state may compel a corporation of another state to submit to its jurisdiction in any aspect, it must be within the state in some form."

Commonwealth of Penn. v. Sun Oil Co., 294 Pa. 99, 60 A. L. R. 737.

Neither the statute nor the sovereignty of the State of California extends to the appellant.

In re Pressed Steel Car Co. of N. J., 20 Fed. Supp. 1016.

In *Moore v. Mitchell* (C. C. A. 2), 30 Fed. (2d) 600, it was held that a court in New York would not take jurisdiction of an action by the county treasurer of Grant County, Indiana, to recover taxes. The court stated (p. 602) that the tax laws of one state cannot be given extra-territorial effect, so as to make collections through the agency of the courts of another state.

With even greater force it can be stated that the Use Tax Act of California cannot be given extra-territorial effect so as to make collections through the agency of an Illinois corporation whose only business in California is interstate in character.

Conclusion.

For the reasons hereinabove set forth the decree of the court below, dismissing the bill and the application for interlocutory injunction and vacating the temporary restraining order, was erroneous and should be reversed.

Respectfully submitted,

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APPENDIX.

CONSTITUTION OF THE UNITED STATES.

Article I, Section 8. The Congress shall have power * * *

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Amendments, Article XIV, Section 1. * * *

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF CALIFORNIA.

Article I, Section 13. * * *

No person shall * * * be deprived of life, liberty, or property without due process of law. * * *

28 U. S. C. A., *Section 41. (Judicial Code, Section 24, amended.) Original jurisdiction.* The districts courts shall have original jurisdiction as follows:

(1) *United States as plaintiff; civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, brought by the United States,

or by any officer thereof authorized by law to sue, or between citizens of the same state claiming lands under grants from different states; or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects. No district court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made. The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a state, or any rate-making body of any political subdivision thereof, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United

States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state. Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the assessment, levy, or collection of any tax imposed by or pursuant to the laws of any state where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such state.

* * * * * * * * *

(14) *Suits to redress deprivation of civil rights.* Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

28 U. S. C. A. *Section 380.* (Judicial Code, Section 266, amended.)

* * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, that one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the state, and to such other persons as may be defendants in the suit: Provided, that if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any

justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the state having jurisdiction thereof under the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the state, that the suit in the state courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.

USE TAX ACT OF 1935.

Chapter 361, Statutes of 1935 as amended; Chapters 401, 671 and 683, Statutes of 1937.

An act imposing an excise tax on the storage, use or other consumption in this State of tangible personal property, providing for the registration of retailers, providing for the levying, assessing, collecting, paying and disposing of such tax, making an appropriation for the administration hereof, prescribing penalties for violations of the provisions hereof and providing that this act shall take effect immediately.

The people of the State of California do enact as follows:

Short Title.

SECTION 1. This act is known and may be cited as the "Use Tax Act of 1935."

Definitions.

Sec. 2. The following words, terms and phrases when used in this act have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

(a) "Storage" means and includes any keeping or retention in this State for any purpose except sale in the regular course of business or subsequent use solely outside this State of tangible personal property purchased from a retailer.

(b) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale of that property in the regular course of business.

(c) "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a purchase.

(d) "Sales price" means the total amount for which tangible personal property is sold, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses or any other expenses whatsoever; provided, that cash discounts allowed and taken on sales shall not be included, and "sales price" shall not include the amount charged for property returned by customers when the entire amount charged therefor is refunded either in cash or credit or the amount charged for labor or services rendered in installing, applying, remodeling or repairing property sold.

(e) "Person" means and includes any individual, firm, copartnership, joint adventure, association, corporation, estate, trust, business trust, receiver, syndicate, this State, any county, city and county, municipality, district or other political subdivision thereof, or any other group or combination acting as a unit, and the plural as well as the singular number.

(f) "Retailer" means and includes every person engaged in the business of making sales for storage, use or other consumption or in the business of making sales

at auction of tangible personal property owned by such person or others for storage, use or other consumption; provided, however, that when in the opinion of the board it is necessary for the efficient administration of this act to regard any salesmen, representatives, peddlers, or canvassers as the agents of the dealers, distributors, supervisors or employers under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors or employers, the board may so regard them and may regard the dealers, distributors, supervisors or employers as retailers for purposes of this act.

(g) "Board" means the State Board of Equalization.

(h) "Tangible person property" means personal property which may be seen, weighed, measured, felt, touched, or is in any other manner perceptible to the senses.

(i) "Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit or advantage, either direct or indirect.

(j) "In this State" or "in the State" means within the exterior limits of the State of California, and includes all territory within such limits owned by or ceded to the United States of America.

Levy of Tax; Tax Rate; Receipt for Tax.

Sec. 3. An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in

this State at the rate of three per cent of the sales price of such property.

Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall be liable for the tax imposed by this act, and the liability shall not be extinguished until the tax has been paid to this State; provided, however, that a receipt from a retailer maintaining a place of business in this State or a retailer authorized by the board, under such rules and regulations as it may prescribe, to collect the tax imposed hereby and who shall for the purposes of this act be regarded as a retailer maintaining a place of business in this State, given to the purchaser in accordance with the provisions of section 6 hereof, shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer.

In the event that the excise tax herein imposed should be judicially determined to be a property tax, this act shall be regarded as having been enacted as of June 30, 1935, in the exercise of the power of classification conferred by section 14 of Article XIII of the California Constitution and all taxes, interest and penalties imposed, levied, assessed, accrued or collected hereunder from such date and prior to the adoption of this amendment are hereby legalized and ratified and the assessment, levy, collection and accrual of all taxes, interest and penalties prior to the adoption of this amendment are hereby legalized, ratified and confirmed as fully to all intents and purposes as if this act had been adopted by the vote of two-thirds of all the members elected to each of the two houses of the Legislature. All such taxes,

interest and penalties which had accrued and remained unpaid on the date of the adoption of this amendment shall be assessed and collected pursuant to the provisions of this act. Nothing contained herein shall be construed to import illegality to the tax imposed by this act.

Exemptions.

Sec. 4. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act:

(a) Property, the gross receipts from the sale of which are required to be included in the measure of the tax imposed by Chapter 1020, Statutes of 1933, and any amendments made or which may be made thereto.

(b) Property, the storage, use or other consumption of which this State is prohibited from taxing under the Constitution or laws of the United States of America or under the Constitution of this State.

(c) Gas, electricity and water, when furnished or delivered to consumers through mains, lines or pipes:

(d) Gold bullion, gold concentrates or gold precipitates, when sold by the producer or refiner thereof for storage, use or other consumption in this State.

(e) Property used for the performance of a contract on public works executed prior to August 1, 1933.

(f) Motor vehicle fuel, the gross receipts received from sales or distributions of which in this State are subject to the tax imposed thereon under the provisions of the "Motor Vehicle Fuel License Tax Act," and not subject to refund.

(g) Food Products Purchased for Human Consumption. "Food products" as used herein includes cereals and cereal products, milk and milk products, oleomargarine, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruit and fruit products, spices and salt, sugar and sugar products other than candy and confectionery, coffee and coffee substitutes, tea, cocoa and cocoa products other than candy and confectionery. "Food products" does not include spirituous, malt or vinous liquors, soft drinks, sodas or beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith.

The exemption of food products set forth herein is made subject to the condition that the gross receipts from retail sales of food products be exempted from the computation of the tax imposed by the Retail Sales Tax Act of 1933, and any amendments thereto: provided, however, that should the gross receipts from retail sales of food products not be exempted from the computation of the tax imposed by said act and any amendments thereto, or should the exemption of the gross receipts from sales of food products from the computation of the tax imposed by said act and any amendments thereto be declared unconstitutional or should the exemption of food products set forth herein be declared unconstitutional then the rate of tax set forth in section 3 hereof shall be two per cent on and after July 1, 1935.

Exemption of Vessels.

Sec. 4.7. The storage, use or other consumption in this State of the following tangible personal property is hereby specifically exempted from the tax imposed by this act, namely, any ship of more than one thousand

tons burden purchased in this State from the builders thereof, with respect to which this tax would, if such ship had been purchased outside this State or purchased in interstate commerce, be inoperative because prohibited under the Constitution or the laws of the United States of America or the Constitution of this State.

Registration of Retailers.

Sec. 5. Every retailer selling tangible personal property for storage, use or other consumption in this State shall within thirty days after the effective date of this act register with the board and give the name and address of all agents operating in this State, the location of any and all distribution or sales houses or offices or other places of business in this State and such other information as the board may require.

Collection of Tax by Retailers; Tax Receipts.

Sec. 6. Every retailer maintaining a place of business in this State and making sales of tangible personal property for storage, use or other consumption in this State, not exempted under the provisions of section 4 hereof, shall, at the time of making such sales or, if the storage, use or other consumption of the tangible personal property is not then taxable hereunder, at the time such storage, use or other consumption becomes taxable hereunder, collect the tax imposed by this act from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board. The tax required to be collected by the retailer from the purchaser shall be displayed separately from the list, advertised in the premises, marked or other price on the sales check or other proof of sales.

It shall be unlawful for any retailer to advertise or hold out or state to the public or to any customer, directly or indirectly, that the tax or any part thereof imposed by this act will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

The tax herein required to be collected by the retailer shall constitute a debt owed by the retailer to this State.

Quarterly Tax Returns and Tax Payments; Presumption That Storage, Use or Other Consumption of Tangible Personal Property Taxable.

Sec. 7. The tax imposed by this act shall be due and payable to the board quarterly on or before the fifteenth day of the month next succeeding each quarterly period during which the storage, use or other consumption of tangible personal property became taxable hereunder, the first of such quarterly periods being the period commencing with the first day of July, 1935, and ending on the thirtieth day of September, 1935. Every retailer maintaining a place of business in this State shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property sold by the retailer, the storage, use or consumption of which became subject to the tax imposed by this act

during the preceding quarterly period, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the retailer during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of tax herein required to be collected by retailers, may require returns and payment of such amount of tax for other than quarterly periods. Returns shall be signed by the retailer or his duly authorized agent but need not be verified by oath.

Every person purchasing tangible personal property, the storage, use or other consumption of which is subject to the tax imposed by this act, and who has not paid the tax due with respect thereto to a retailer required or authorized hereunder to collect the tax, shall on or before the fifteenth day of the month following the close of the first quarterly period as above defined, and on or before the fifteenth day of the month following each subsequent quarterly period of three months, file with the board a return for the preceding quarterly period in such form as may be prescribed by the board showing the total sales price of the tangible personal property purchased by such person, the storage, use or other consumption of which became subject to the tax imposed by this act during the preceding quarterly period and with respect to which the tax was not paid to a retailer required or authorized hereunder to collect the tax, and such other information as the board may deem necessary for the proper administration of this act. The return shall be accompanied by a remittance of the amount of tax herein imposed and not paid to a retailer required

or authorized hereunder to collect the tax during the period covered by the return. The board, if it deems it necessary in order to insure payment to the State of the amount of such tax may require returns and payment for other than quarterly periods. Returns shall be signed by the person liable for the tax or his duly authorized agent but need not be verified by oath.

The board, if it deems it necessary to insure the collection of the tax imposed by this act, may provide by rule and regulation for the collection of said tax by the affixing and canceling of revenue stamps and may prescribe the form and method of such affixing and canceling.

For the purpose of the proper administration of this act and to prevent evasion of the tax and the duty to collect the same herein imposed, it shall be presumed that tangible personal property by any person for delivery in this State is sold for storage, use or other consumption in this State unless the person selling such property shall have taken from the purchaser a certificate signed by and bearing the name and address of the purchaser to the effect that the property was purchased for resale and it shall be further presumed that tangible personal property shipped to this State by the purchaser thereof was purchased from a retailer on or after July 1, 1935, for storage, use or other consumption in this State.

Delinquency Penalty; Interest.

Sec. 8. Any person failing to pay any tax to the State or any amount of tax herein required to be collected and paid to the State, except amounts determined to be due by the board under the provisions of sections 9 and 10 hereof, within the time required by this act shall

pay in addition to the tax or the amount of tax herein required to be collected a penalty of ten per cent thereof, plus interest at the rate of one-half of one per cent per month, or fraction thereof, from the date at which the tax or the amount of tax herein required to be collected became due and payable to the State.

Additional Determinations.

Sec. 9. If the board is not satisfied with the return and payment of the tax or the amount of tax herein required to be paid to the State by any person, it is hereby authorized and empowered to compute and determine the amount required to be paid based upon the facts contained in the return or upon any information within its possession or that shall come into its possession. All amounts determined to be due under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the board until paid. If any part of the deficiency for which a determination of an additional amount due is made is due to negligence or intentional disregard of the act or authorized rules and regulations, a penalty of ten per cent of such amount shall be added thereto. If any part of the deficiency for which a determination of an additional amount due is made is due to fraud or an intent to evade the act or authorized rules and regulations, a penalty of twenty-five per cent of such amount shall be added thereto. The board shall give to the retailer or person storing, using or consuming tangible personal property written notice of its determination. Such notice may be served per-

sonally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the retailer or person storing, using or consuming tangible personal property at his address as the same appears in the records of the board.

Arbitrary Determinations.

Sec. 10. If any person neglects or refuses to make a return required to be made by this act, the board shall make an estimate for the period or periods in respect to which such person failed to make a return, based upon any information in its possession or that may come into its possession, of the amount of the total sales price of tangible personal property sold or purchased by such person, the storage, use or other consumption of which in this State is subject to the tax imposed by this act, and upon the basis of said estimate compute and determine the amount required to be paid to the State, adding to the sum thus arrived at a penalty equal to ten per cent thereof. All amounts determined to be due under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case may be, for which such amounts were required to be reported to the board until paid. If the neglect or refusal of any person to file a return as required by this act was due to fraud or an intent to evade this act or rules and regulations hereunder, a penalty of twenty-five per cent of the amount required to be paid by such person shall be added thereto in addition to the ten per cent penalty as above provided. Promptly thereafter the board shall give to such person

written notice of such estimate, determination and penalty, the notice to be served personally or by mail in the same manner as prescribed for service of notice by the provisions of section 9 hereof.

Jeopardy Determinations.

Sec. 11. If the board believes that the collection of any tax or any amount of tax herein required to be collected and paid to the State will be jeopardized by delay, it shall thereupon make a determination of such tax or amount of tax herein required to be collected, noting that fact upon such determination, and the amount thereof shall be immediately due and payable. If the amount specified in the determination is not paid within ten days after the service upon the person against whom the determination is made of notice thereof, such amount becomes final at the expiration of such ten days, unless a petition for redetermination is filed within such ten days, and the delinquency penalty and the interest provided in section 8 hereof shall attach to the amount of the tax or the amount of the tax required to be collected specified therein.

The person against whom a jeopardy determination is made hereunder may petition for the redetermination thereof pursuant to section 12 hereof; provided, however, that such petition for redetermination must be filed with the board within ten days after the service upon such person of notice of the determination; and provided further, that such person must within said ten-day period deposit with the board such security as it may deem necessary to insure compliance with the provisions of this act. Such security may be sold by the board in the manner prescribed by section 14 hereof.

Petition for Redetermination; Hearing; Due Date of Determinations; Delinquency Penalty.

Sec. 12. Any person from whom an amount is determined to be due under the provisions of section 9 or 10 hereof may petition for a redetermination thereof within thirty days after service upon such person of notice thereof. If a petition for redetermination is not filed within said thirty day period, the amount determined to be due becomes final at the expiration thereof. If a petition for redetermination is filed within said thirty day period, the board shall reconsider the amount determined to be due, and if such person has so requested in his petition, shall grant such person an oral hearing and shall give such person ten days' notice of the time and place thereof. The board shall have power to continue the hearing from time to time as may be necessary.

The order or decision of the board upon a petition for redetermination shall become final thirty days after service upon such person of notice thereof.

All amounts determined to be due by the board under the provisions of section 9 or 10 hereof shall become due and payable at the time they become final and if not paid when due and payable there shall be added thereto a penalty of ten per cent of the amount determined to be due.

Any notice required by this section shall be served personally or by mail in the same manner as prescribed for service of notice by the provisions of section 9 hereof.

Extension of Time for Filing Returns.

Sec. 13. * * *.

Security for Payment of Tax.

Sec. 14. The board, whenever it deems it necessary to insure compliance with the provisions of this act, may require any person subject thereto to deposit with it such security as the board may determine. The same may be sold by the board at public auction if it becomes necessary so to do in order to recover any tax, or any amount herein required to be collected, interest or penalty due. Notice of such sale may be served upon the person who deposited such security personally or by mail; if by mail, service shall be made in the manner prescribed by section 1013 of the Code of Civil Procedure and addressed to the person at his address as the same appears in the records of the board. Upon any such sale, the surplus, if any, above the amounts due under this act shall be returned to the person who deposited the security.

Limitation of Time for Making Additional Determinations.

Sec. 15. * * *.

Interest on Delinquent Payments.

Sec. 16. All taxes or amounts herein required to be collected not paid to the board on the date when the same became due and payable shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from and after the date when the same became due and payable until paid.

Overpayments; Refunds.

Sec. 17. If the board determines that any amount, penalty or interest has been paid more than once, or has been erroneously or illegally collected or computed, the board shall set forth that fact in the records of the board and shall certify to the State Board of Control the amount collected in excess of what was legally due, from whom it was collected, or by whom paid to the board, and if approved by the State Board of Control the same shall be credited on any amounts then due from such person under this act or the California Retail Sales Tax Act of 1933, and the balance shall be refunded to such person, or his successors, administrators, executors or assigns, but no such credit or refund shall be allowed unless a claim therefor is filed with the State Board of Equalization within three years from the date of overpayment. Every such claim must be in writing and must state the specific grounds upon which the claim is founded.

Interest shall be allowed and paid upon any overpayment of any amount of tax, if the overpayment was not made because of an error or mistake on the part of the person making such overpayment, at the rate of six per centum per annum as follows:

(1) In the case of a credit, from the date of the overpayment to the date of the allowance of the credit. Any interest allowed on any credit shall first be credited on any amounts due from the person to whom the credit is given under this act or the California Retail Sales Tax Act of 1933.

(2) In the case of a refund, from the date of the overpayment to a date preceding the date of the refund

warrant by not more than thirty days, such date to be determined by the board.

Any refund or any portion thereof which is erroneously made and any credit or any portion thereof which is erroneously allowed, may be recovered in an action brought by the Controller of the State in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California and such action shall be tried in the county of Sacramento unless the court with the consent of the Attorney General, orders a change of place of trial. The Attorney General must prosecute such action, and the provisions of the Code of Civil Procedure relating to service of summons, pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for.

In the event that any amount has been illegally determined to be due from any person the board shall certify such fact to the State Board of Control and said board shall authorize the cancellation of such amount upon the records of the board.

Fraud or Evasion of Tax.

Sec. 18. If fraud or evasion on the part of any person is discovered by the board, it shall determine the amount by which the State has been defrauded, shall add to the amount so determined a penalty equal to twenty-five per cent thereof, and shall determine the same to be due from such person. All amounts determined to be due from any person under the provisions of this section shall bear interest at the rate of one-half of one per cent per month, or fraction thereof, from the fifteenth day after the close of the period or periods, as the case

may be, for which such amounts should have been paid. The amount so determined shall be immediately due and payable and if not paid within ten days after the service upon such person of notice of the amount determined to be due, the delinquency penalty and interest provided in section 8 hereof shall attach thereto.

Report of Board to Controller.

Sec. 19. The board shall report to the Controller the amount of collections under this act and he shall keep a record thereof.

Collection Procedure; Lien of Tax.

Sec. 20. In any case in which any amount required to be paid to the State in accordance with the provisions of this act, is not paid when due the board may file in the office of the county clerk of Sacramento County, or any other county, a certificate specifying the amount required to be paid, interest and penalty due, the name and last known address of the retailer or other person liable for the same, that the board has complied with all the provisions of this act in relation to the determination of the amount herein required to be paid and a request that judgment be entered against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in the certificate. The county clerk immediately upon the filing of such certificate shall enter a judgment for the people of the State of California against the retailer or other person in the amount herein required to be paid, together with interest and penalty as set forth in this certificate. The judgment may be filed by the county

clerk in a loose-leaf book entitled, "Special Judgments for State Retail Sales or Use Tax."

An abstract of such judgment or a copy thereof may be recorded with the county recorder of any county and from the time of such recording, the amount herein required to be paid, together with interest and penalty therein set forth shall constitute a lien upon all the real property of the retailer or other person liable for the tax, interest or penalty in such county, owned by him or which he may afterwards and before the lien expires acquire, which lien shall have the force, effect and priority of a judgment lien. Execution shall issue upon such a judgment upon request of the board in the same manner as execution may issue upon other judgments and sales shall be held under such execution as prescribed in the Code of Civil Procedure. In all proceedings under this section the board shall be authorized to act on behalf of the people of the State of California.

If any retailer liable for an amount of tax herein required to be collected shall sell out his business or stock of goods or shall quit the business, he shall make a final return and payment within fifteen days after the date of selling or quitting business. His successor, successors or assigns, if any, shall be required to withhold sufficient of the purchase money to cover the amount of such taxes herein required to be collected and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the board showing that they have been paid, or a certificate stating that no amount is due. If the purchaser of a business or stock of goods shall fail to withhold purchase money as above provided, he shall be personally liable for the payment of the amount

of taxes herein required to be collected by the former owner, interest and penalties accrued and unpaid by any former owner, owners or assignors.

In the event that any person is delinquent in the payment of the amount herein required to be paid by him, the board may give notice of the amount of such delinquency by registered mail to all persons having in their possession, or under their control, any credits or other personal property belonging to such person, or owing any debts to such person at the time of the receipt by them of such notice and thereafter any person so notified shall neither transfer nor make any other disposition of such credits, other personal property, or debts until the board shall have consented to a transfer or disposition, or until twenty days shall have elapsed from and after the receipt of such notice. All persons so notified must, within five days after receipt of such notice advise the board of any and all such credits, other personal property or debts, in their possession, under their control or owing by them, as the case may be.

At any time within three years after any person is delinquent in the payment of any amount herein required to be paid, the board may proceed forthwith to collect such amount in the following manner: The board shall seize any property, real or personal, of such person and thereafter sell at public auction such property so seized, or a sufficient portion thereof, to pay the amount due hereunder, together with any interest or penalties imposed hereby for such delinquency, and any and all costs that may have been incurred on account of such seizure and sale. Notice of such intended sale and the time and place thereof, shall be given to such delinquent person

in writing at least ten days before the date set for such sale by enclosing such notice in an envelope addressed to such person at his last known address or place of business, if any, and depositing the same in the United States mail, postage prepaid, and by publication for at least ten days before the date set for such sale in a newspaper of general circulation published in the county or city and county in which the property seized is to be sold; provided that if there be no newspaper of general circulation in such county or city and county, then by the posting of such notice in three public places in such county or city and county ten days prior to the date set for such sale. The said notice shall contain a description of the property to be sold, together with a statement of the amount due, including interest, penalties and costs, if any, the name of the person from whom due, and the further statement that unless the amount due, interest and penalties and costs are paid on or before the time fixed in said notice for such sale, said property, or so much thereof as may be necessary, will be sold in accordance with law and said notice.

At any such sale, the property shall be sold by the board in accordance with law and said notice, and the board shall deliver to the purchaser a bill of sale for the personal property, and a deed for any real property so sold, and such bill of sale or deed shall vest the interest or title of the retailer or other person liable for the tax in the purchaser. The unsold portion of any property so seized may be left at the place of sale at the risk of the retailer or other person liable for the tax. If upon any such sale, the moneys so received shall exceed the total of all amounts including interest, penalties and costs due the State, any such excess shall be returned to

the retailer, or other person liable for the tax, and his receipt therefor obtained; provided, however, that if any person having an interest or lien upon the property, has filed with the board prior to any such sale notice of such interest or lien the board shall withhold any such excess pending a determination of the rights of the respective parties thereto by a court of competent jurisdiction. If, for any reason, the receipt of such retailer or other person liable for the tax shall not be available, the board shall deposit such excess moneys with the State Treasurer, as trustee for such owner, subject to the order of such retailer or other person liable for the tax, his heirs, successors or assigns.

It is expressly provided that the foregoing remedies of the State shall be cumulative and that no action taken by the board or Attorney General shall be construed to be an election on the part of the State or any of its officers to pursue any remedy hereunder to the exclusion of any other remedy for which provision is made in this act.

Records; Administration of Act by Board.

Sec. 21. Every retailer and every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer shall keep such records, receipts, invoices and other pertinent papers in such form as the board may require.

The board or any person authorized in writing by it is hereby authorized to examine the books, papers, records and equipment of any person selling tangible personal property and any person liable for the tax imposed by this act and to investigate the character of

the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount required to be paid hereunder.

The board is hereby charged with the enforcement of the provisions of this act and is hereby authorized and empowered to prescribe, adopt and enforce rules and regulations relating to the administration and enforcement of the provisions of this act and to employ such accountants, auditors, investigators, assistants and clerks as may be determined to be necessary for the efficient administration of this act and may designate representatives to conduct hearings, prescribe regulations or perform any other duties imposed by this act or other laws of this State upon the board.

The board may prescribe the extent, if any, to which any ruling or regulation relating to this act shall be applied without retroactive effect.

Information Confidential.

Sec. 22. It shall be unlawful for the board, or any person having an administrative duty under this act to divulge or to make known in any manner whatever, the business affairs, operations, or information obtained by an investigation of records and equipment of any retailer or any other person visited or examined in the discharge of official duty, or the amount or source of income, profits, losses, expenditures or any particular thereof, set forth or disclosed in any return, or to permit any return or

copy thereof of any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; provided, however, that the Governor may authorize examination of such returns by other State officers, by tax officers of another State, or the Federal Government, if a reciprocal arrangement exists, and any other persons the Governor may so authorize.

Any violation of the provisions of this section shall be a misdemeanor and be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court.

Disposition of Proceeds.

Sec. 23. All fees, taxes, interest and penalties imposed and all amounts of tax herein required to be paid to the State under this act must be paid to the board in the form of remittances payable to the State Board of Equalization of the State of California, and said board shall transmit such payments to the State Treasurer to be deposited in the State treasury to the credit of the retail sales tax fund. The moneys paid under this act and deposited in the retail sales tax fund shall, upon order of the State Controller, be drawn therefrom for the purpose of making refunds hereunder or be transferred to the general fund of the State.

Suit to Enforce Payment.

Sec. 24. At any time within three years after any amount herein required to be collected has become due and payable and any time within three years after the delinquency of any tax, the board may bring an action in the courts of this State, any other State or in any court of the United States in the name of the people of the State of California to collect the amount delinquent, together with penalties and interest. The Attorney General must prosecute such action. In such action a writ of attachment may issue, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the board showing the delinquency shall be prima facie evidence of the determination of the amount due hereunder, of the delinquency and of the compliance by the board with all the provisions of this act in relation to the computation and determination of such amount.

In any action brought under the provisions of this act process may be served according to the provisions of the Code of Civil Procedure and the Civil Code of this State or may be served upon any agent or clerk in this State employed by any retailer in a place of business maintained by such retailer in this State, in which case a copy of the process shall forthwith be sent by registered mail to the retailer at his principal or home office.

Payment Under Protest; Suit for Refund.

Sec. 25. No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any tax or any amount of tax herein required to be collected; but after payment of any such tax or any such amount of tax herein required to be collected under protest, duly verified and setting forth the grounds of objection to the legality thereof, the retailer or person making the payment may bring an action against the State Treasurer in a court of competent jurisdiction in the county of Sacramento for the recovery of the amount paid under protest. No such action may be instituted more than one year after the tax or the amount herein required to be collected and paid to the State becomes due and payable, and failure to bring suit within said one year shall constitute waiver of any and all demands against the State on account of alleged overpayments hereunder. No grounds of illegality shall be considered by the court other than those set forth in the protest filed at the time of the payment of the tax or the amount herein required to be collected and paid to the State.

If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any taxes or amounts due from the plaintiff under this act, and the balance of the judgment shall

be refunded to the plaintiff. In any such judgment, interest shall be allowed at the rate of six per cent per annum upon the amount found to have been illegally collected from the date of payment of such amount to the date of allowance of credit on account of such judgment or to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the board.

In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any amount paid hereunder, when such action is brought by or in the name of an assignee of the retailer or other person paying said amount, or by any person other than the person who has paid such amount.

Penalty for Failure to Make Return or for Making False or Fraudulent Return.

Sec. 26. Any retailer or other person failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the board, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five hundred dollars ($500) for each such offense.

Any person required to make, render, sign or verify any report as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the determination of an amount due required by law to be made, shall

be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5000) or be imprisoned not exceeding one year in the county jail or be subject to both said fine and imprisonment in the discretion of the court.

Penalty for Violation of Act.

Sec. 27. Any violation of the provisions of this act, except as otherwise herein provided, shall be a misdemeanor and punishable as such.

Constitutionality.

Sec. 28. If any section, subsection, clause, sentence or phrase of this act which is reasonably separable from the remaining portions of this act is for any reason held to be unconstitutional, such decision shall not affect the remaining portions of this act. The Legislature hereby declares that it would have passed the remaining portions of this act irrespective of the fact that any such section, subsection, clause, sentence or phrase of this act be declared unconstitutional.

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